



## WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** June 18, 2020

**TO** Members, Select Committee on School Finance Recalibration

**FROM** Josh Anderson, Senior Staff Attorney

**SUBJECT** Historical Review of Recalibration and Related Issues

### INTRODUCTION

This memo will provide a background of the Wyoming Supreme Court caselaw related to school funding, the Wyoming education resource block grant model (model) and the recalibration of the model. The memo will also address some questions that have been raised related to the recalibration process. One important caveat: while many of the Wyoming Supreme Court (Court) cases also address school capital construction, that issue is not generally contemplated within the recalibration of the model and as such the capital construction issues as addressed by the Court will not be significantly discussed in the review below.

### Constitutional Provisions

The Court cases that will be discussed in more detail below are based on several primary constitutional provisions which are set out here for informational purposes:

- Article 1, Section 23 - The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.
- Article 7, Section 1 - The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.
- Article 7, Section 9 - The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge; and in view of such provision so made, the legislature shall require that every child of sufficient physical and mental ability shall attend a public school during the period between six and eighteen years for a time equivalent to three years, unless educated by other means.
- Article 15, Section 15 - For the support of the public schools in the state there may be levied each year a state tax not exceeding twelve mills on the dollar of the assessed valuation of the property in the state.

- Article 15, Section 17 - There shall be levied each year in each county of the state a tax of not to exceed six (6) mills on the dollar of the assessed valuation of the property in each county for the support and maintenance of the public schools. This tax shall be collected by the county treasurer and disbursed among the school districts within the county as the legislature shall provide. The legislature may authorize boards of trustees of school districts to levy a special tax on the property of the district. The legislature may also provide for the distribution among one (1) or more school districts of any revenue from the special school district property tax in excess of a state average yield, which shall be calculated each year, per average daily membership. \*

**\*Note:** This section of the constitution was amended in 1982 and 2006 in response to the Supreme Court decisions and those amendments will be discussed in further detail below.

## **HISTORICAL REVIEW**

The Court has significantly addressed the issue of school funding in five "landmark" decisions that will be discussed below. The cases are cited here for reference as follows:

Washakie – *Washakie County School District No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980)

Campbell I – *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995)

Campbell II – *State v. Campbell County School District*, 19 P.3d 518 (Wyo. 2001)

Campbell III – *State v. Campbell County School District*, 32 P.3d 325 (Wyo. 2001)

Campbell IV – *Campbell County School District v. State*, 181 P.3d 43 (Wyo. 2008)

### **Washakie**

In June 1978, several school districts brought a declaratory judgment action against the state seeking that the state's system of funding education be declared unconstitutional.

The Court held in part that the provisions in the Wyoming constitution "...should leave no doubt that the legislature has complete control of the state's school system in every respect, including division of the state into school districts and providing for their financing." *Washakie* at 320. The Court went on to state that: "The matter of providing a school system as a whole and financing it is a responsibility of the legislature." *Id.*

At the time of *Washakie*, the legislature had adopted the Wyoming School Foundation Program which provided state financial assistance to school districts based on the taxpaying ability of the local school district. However, the Court found that the system did not adequately address the disparity between wealthy and poor school districts as measured by property value. The Court stated that "the quality of a child's education in Wyoming, measured in terms of dollars available for that purpose, is dependent upon the property tax resources of his school district. The right to an education cannot constitutionally be conditioned on wealth in that such a measure does not afford equal protection." *Id.* at 332. The Court then found that education was a fundamental interest, stating "[a] classification on the basis of wealth is considered suspect, especially when applied to fundamental interests." *Id.* at 334.

The Court held the school finance system unconstitutional due to failing to provide equal protection. In finding the system unconstitutional, the Court held that "whatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole." *Id.* at 336. The Court then stated that the conversion to a constitutional system should be in effect not later than July 1, 1982 and directed the district court to retain jurisdiction. *Id.* at 337.

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### **Wyoming Constitution Article 15, Section 17**

Following the *Washakie* decision, the legislature sought to redesign the school finance formula. As part of that effort, the legislature adopted a resolution that was submitted to the voters to amend Article 15, Section 17 of the Wyoming Constitution in order to allow for a school district levy and to allow the legislature to recapture and distribute up to three-fourths of any revenue from that levy that exceeded the statewide average. 1981 House Joint Resolution No. 3. Article 15, Section 17 was also amended to reduce the number of county mills from 12 to 6 while Article 15, Section 15 was amended to increase the number of statewide education mills from 6 to 12.

Article 15, Section 17 of the Constitution was amended again in 2006 to strike the language limiting the amount of revenue that can be recaptured to "three-fourths". 2006 Senate Joint Resolution No. 1.

### **Campbell I**

In January 1992, four school districts brought suit against the State of Wyoming claiming portions of the Wyoming school finance system implemented following the *Washakie* decision were unconstitutional.

In upholding the challenge brought by the school districts, the Court defined three duties that were required of the legislature:

1. The 'system of public instruction' must be 'complete and uniform';
2. The 'system of public schools' must be 'thorough and efficient'; and
3. The thorough and efficient system of public schools must be 'adequate to the proper instruction of the state's youth.

*Campbell I* at 1264.

The Court then discussed the elements of the finance system that were being challenged:

- **Recapture:** The system at the time permitted recapture districts to retain 109% of their school foundation program guarantee. The Court stated that "only cost-justified funding variations are permitted." *Id.* at 1269. Finding that the recapture statute was not based upon a formula and no evidence revealed the retention level was the product of any calculation, the Court held that the 109% retention level was "an arbitrarily derived amount in violation of *Washakie*." *Id.*
- **Optional Mill Levies:** The Court affirmed the district court decision that "the optional mill feature is wealth-driven in violation of equal protection. *Id.* at 1270. The Court rejected the argument that the optional mill levy was necessary for local control and found that "local control is not a constitutionally recognized interest and cannot be the basis for disparity in equal educational opportunity. *Id.* The Court did leave open the possibility of local enhancement above the "cost-based, state-financed proper education", but held that the optional mills as implemented had an "impact upon 'basic' equal educational opportunity." *Id.* at 1274. The Court also noted that if the definition of a proper education were to change as the result of a local enhancement, "all students are entitled to the benefit of that change as part of a cost-based, state-financed proper education." *Id.*
- **Capital Construction Financing:** The Court held that "deficient physical facilities deprive students of an equal educational opportunity and any financing system that allows such deficient facilities to exist is unconstitutional." *Id.* at 1275.

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- **Distribution Formula:** The Court held that "any justification which is not demonstrably cost-based is constitutionally infirm." *Id.* at 1276. The Court looked at several challenged components of the distribution formula including the amount of funding per classroom unit, the use of divisors for low enrollment schools, the municipal divisor and the recalculation formula. The Court found that none of the challenged components were based on actual costs and held them all to be unconstitutional.

Following that discussion, the Court stated that "the education system must achieve financial parity. A cost of education study and analysis must be conducted and the results must inform the creation of a new funding system." *Id.* at 1279. The Court went on to state that "the legislature must first design the best educational system by identifying the 'proper' educational package each Wyoming student is entitled to have whether she lives in Laramie or in Sundance. The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package." *Id.*

Following the *Campbell I* decision, the legislature retained a consulting firm, Management Analysis & Planning Associates (MAP), to assist in developing a constitutional school finance system.

### **Campbell II**

In reviewing the revamped school finance system in 2001, the Court first held that "the cost-based model approach chosen by the legislature is capable of supporting a constitutional school finance system." *Campbell II* at 537. The Court also held that "use of past statewide average expenditures to estimate the cost of education was appropriate." *Id.* at 538. The Court then reviewed the funding system as adopted to determine if it adequately funded the estimated costs. The Court reviewed the following components:

- **Teacher Salaries:** The Court held that teacher salaries as computed by the model were reasonable, with two caveats. First, the Court required that for "the school financing system as a whole to maintain cost-based validity, the legislature shall conduct a review of the components in 2001 and at least every five years." *Id.* at 543. Next, the Court held that "in order for the model to remain cost-based, an external cost adjustment for inflation or deflation, as warranted, must be applied on an annual or, at a minimum, biennial basis." *Id.* However, it is important to note that this requirement may only apply to funding that is based on historical expenditures and may not apply if another system were developed, "As long as the state continues to rely upon a cost of education model based upon historic actual costs to determine the appropriate funding for schools, regular and timely inflation adjustments are essential..." *Id.* at 549.
- **Other Salaries:** The Court held that the component needed to be "adjusted in a fashion similar to teacher salaries to account for differences in experience, responsibility, and seniority." *Id.* at 544.
- **School District Operations:** The Court held that this component was not based on the real and necessary costs of maintenance and operations. The Court said that "this component must be adjusted either by development of a formula...or by reimbursement of actual costs subject to state oversight." *Id.*
- **Transportation and Special Education:** These components were funded at 100% of the prior year's expenditures but limited increases to 110% compared to increases in total district spending, subject to a finding that the additional expenditures were necessary. This component was upheld by the Court.
- **At-risk Students:** The Court reviewed the funding formula for economically disadvantaged youth (EDY) and limited English speaking (LES) students. The Court held that the funding for EDY was

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"arbitrary and admittedly not based on the full range of at-risk programs." *Id.* at 546. The Court found similar issues with the LES funding component. The Court upheld the funding of gifted and talented programs under the model. *Id.* at 548.

- Vocational Education: The Court held that "the actual costs of providing vocational teachers and equipment must be examined, included as a line item in the MAP model, and funded accordingly." *Id.*
- External Cost Adjustment/Inflation Adjustment: Similar to the discussion under the teacher salary section, the Court held that "the legislature shall conduct a review of all the components every five years to ensure that funding accurately reflects the actual costs school districts are paying because of current market or economic conditions." *Id.* at 549. The Court again held that between reviews, "the model and statute must be adjusted for inflation/deflation every two years at a minimum." *Id.*
- Small School Adjustment: The Court held that the small school adjustment mechanism, which was a multiplier at 200 and 400 average daily membership (ADM), was not based on evidence of cost differences and was unconstitutional. *Id.* at 551. The portion of the model that provided full reimbursement of some costs, including utilities, activities and food service, for small schools was unconstitutional and held that "the actual costs of student activities and food services for all schools, both small and large, must be examined and compared to the MAP model." *Id.* at 552.
- Small School District Adjustment: The model provided additional funding for districts with less than specified levels of ADM. The Court found that there was no support for either the ADM levels included in the formula or the amount of funding that was provided and stated that "disparate treatment of schools based upon arbitrary standards cannot be justified." *Id.* at 553.
- Regional Cost Adjustment: The model was adjusted using the Wyoming Cost of Living Index (WCLI), modified by removing the medical component and by removing the rental of shelter portion of the housing component. The Court held that "salaries must be adjusted for the full cost-of-living differences using either the entire WCLI or another reasonable formula..." *Id.* at 555.
- Kindergarten Error: The Court directed the legislature to fund a one-time shortfall in funding due to how the model counted kindergarten ADM during the 1998-99 school year. This was an unintentional error in the implementation of the model and not a "legal dispute." *Id.*
- Capital Construction: The Court said that it "affirmed the trial court's decision and hold the current capital construction system to be unconstitutional." *Id.* at 556.

The Court noted that "much of this effort took place in an environment of tax revenue shortfalls. However, as *Campbell* made so very clear, the constitution provides that education funding is a fundamental right of our citizens and 'lack of financial resources will not be an acceptable reason for failure to provide the best educational system.'" *Id.* at 566. The Court then held that the state had established a model that was "capable of fulfilling Wyoming children's fundamental constitutional right to an education 'appropriate for the times'", subject to the legislature making the changes outlined in the opinion and directed the trial court to retain jurisdiction. *Id.*

### **Campbell III**

This decision was a result of a rehearing of *Campbell II* related to the specific issue of financing capital construction of schools and will not be discussed in detail in this memo. The Court held among other things

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that "the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards." *Campbell III* at 337.

Justice Voigt issued a dissenting opinion with this decision saying that the "issues presented...in the State's Petition for Rehearing are non-justiciable political questions that should be left to the legislature." *Id.* at 345. However, the majority disagreed with that analysis stating "[w]e continue to recognize that it is our duty to declare void all legislation that is unconstitutional." *Id.* at 331.

#### **Campbell IV**

This decision followed several years after *Campbell II* and *Campbell III* to determine if the state had complied with the directives in those cases. The Court in 2008 found that "the legislature has in place a thorough and efficient educational structure funded from state wealth as required by our state constitution." *Campbell IV* at 48. In discussing the standard of review the Court noted that "state action resulting in a wealth-based disparity in public education funding will be subject to 'strict scrutiny to determine if it is necessary to achieve a compelling state interest.'" *Id.* at 49. However, the Court noted that in reviewing the revisions and recalibration of the model, the question was "whether or not the state's revisions...reflected costs as closely as could reasonably be expected. If they did, then any differences in funding between school districts were not wealth-based..." and the strict scrutiny test did not apply. *Id.* at 50.

The Court discussed several components of the model in detail:

- **Recalibration:** The Court considered the first recalibration of the model in 2001. The Court noted that "*Campbell II* did not dictate any particular recalibration process, but only that the individual components should be reviewed so that the model remained current." *Id.* at 52. The Court held that the "state's effort to respond to the requirement that the models be updated and recalibrated met the requirements of this Court's mandate." *Id.* at 55. The Court also clarified that it "did not and should not dictate the method the state must use to determine the cost of education." *Id.* It went on to say that "the parties somewhat lost perspective on the primary constitutional issue – does the state's chosen method of funding represent, as close as reasonably possible, the cost of education." *Id.*
- **Maintenance and Operations:** Following *Campbell II*, the legislature adopted a formula to fund maintenance and operations based on square footage and ADM. In reviewing this component, the Court stated "It should be remembered that the strict scrutiny test applies when differences in funding are wealth-based. If the difference in funding between districts is based upon what the state has determined a particular component should cost, and not on wealth, then an equal protection issue is not raised. We observe that no one has suggested the differences in operation and maintenance funding between districts are not based upon the state's determination of what that component should cost. Consequently, applying the proper constitutional measure, one must conclude the differences in funding do not result in a denial of equal protection." *Id.* at 56
- **At-Risk Students:** In response to *Campbell II*, the legislature developed a formula providing additional funding for schools with a high proportion of at-risk students and revised how at-risk students were identified. The Court ultimately held that the state had responded appropriately to the *Campbell II* requirement to address at-risk students. *Id.* at 59.
- **Vocational Education:** After *Campbell II* the legislature addressed vocational education through a combination of increased operational funding and a series of grants. The Court held that the state "appropriately responded to our *Campbell II* mandate regarding vocational education. *Id.* at 60.

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However, the Court did "encourage the legislature to continue its study of this important aspect of education..." *Id.*

- **Small School Adjustment:** Following *Campbell II*, the legislature revised the small school adjustment and removed the arbitrary cutoffs identified in *Campbell II*. The Court held that this component complied with the requirements of *Campbell II*. *Id.* at 61.
- **Small Districts:** The legislature revised this component after an extensive review. The Court held that the model adopted by the legislature was "cost based and complied with *Campbell II*..." *Id.*
- **Regional Cost Adjustment:** In response to *Campbell II* the legislature amended the statute to include the full WCLI including the medical and rental of shelter components. The adjustment was applied to both increase funding in some areas and to decrease funding in other areas where the cost of living was below the statewide average. The Court stated that applying the regional cost adjustment to decrease funding "ignores what the figure being adjusted represents, i.e. appropriate cost of providing teachers." *Id.* at 63. The Court held that "so long as the state relies upon a cost of education model, regional cost of living adjustments cannot reduce salaries below those which the state's model establishes as the statewide cost of hiring personnel." *Id.* at 64.
- **External Cost Adjustment:** As discussed above, *Campbell II* required the model to be recalibrated every five years and that it also be adjusted at least every two years to account for inflation. The Court noted that the legislature had conducted recalibrations in 2001 and 2006 and that the legislature had also adopted inflation adjustments in school years 2003-04, 2004-05 and 2005-06. The Court held that "The only constitutional requirement is, so long as a model based upon historic costs is used, those costs must be escalated for inflation in order to assure education funding continues to adequately support the actual cost of education." *Id.* at 65.
- **Cost Approach to Funding:** The Court discussed the challengers' concerns related to the cost approach to funding. The Court said that "this Court has consistently recognized the constitutional directive that it is the legislature's duty and prerogative to determine the appropriate standards for our public schools and to assure sufficient funding is provided to allow the districts to achieve those standards. While perfection is not required or expected, a good faith effort to preserve and protect our constitution's commitment to a sound public education system is. We are convinced, as was the district court, that the state has met that standard and will continue to do so in the future." *Id.* at 67.
- **Timeliness of State Action:** Although the state did not meet the timelines set in the *Campbell II* decision, the Court held that "the state acted in good faith on issues of operations funding and heeded the urgency expressed in our opinions." *Id.* at 68.
- **Cost Plus Funding:** The Court discussed concerns brought by the challengers related to funding that is provided outside of the model, such as additional state funding outside of the model and federal funding of specific educational functions. The Court found that "So long as the legislature continues to act in a responsive and responsible manner and the model is not allowed to become out-dated, we can see no constitutional infirmity with so-called "cost plus" funding." *Id.* at 69.
- **Pre-school Funding:** In consideration of Article 7, Section 9 of the Wyoming Constitution which provides for education between the ages of six and twenty-one, the Court agreed that "the constitution does not require the state to provide the necessary funds for each district to offer voluntary pre-schools..." *Id.* at 70.

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- **Funding Shortfalls and Attorneys Fees:** The Court declined to provide for attorneys fees and took no action regarding the complaints about funding shortfalls saying that errors in the model "will continue to be unavoidable, resulting in minor over-funding or under funding." *Id.* at 71.
- **Capital Construction:** The Court held that the system was generally constitutional but identified certain issues to be addressed including the general implementation of guidelines adopted by the School Facilities Commission (SFC), and particularly in the areas of student activities, local enhancements and review of SFC decisions.

Ultimately, the Court held that the state had complied with the mandates of *Campbell II* other than identifying certain issues related to capital construction and "problems with application of the WCLI that must be corrected." *Id.* at 83.

### QUESTIONS FOR DISCUSSION

Below are some questions that were submitted to the LSO in the context of recalibration for purposes of discussion. Note that the LSO is unable to predict how a court may rule if significant changes were made to the school finance system and those changes were challenged in court.

1. **Why does the legislature conduct a recalibration?** As noted above, the *Campbell II* decision first described a requirement that the model be recalibrated every five years to ensure that the model remains cost-based. That requirement was recognized in *Campbell IV* with the Court noting that the legislature had met the Court's mandate with the 2001 recalibration and also noting that the legislature had conducted another recalibration in 2006. Recalibration is currently required by statute not less than once every five years pursuant to W.S. 21-13-309(t).
2. **Why has the legislature hired a consultant for purposes of recalibration?** As noted in the discussion above, the legislature first hired a consultant in response to the *Campbell I* decision. That decision specified in part that: "A cost of education study and analysis must be conducted and the results must inform the creation of a new funding system." *Campbell I* at 1279. In general, both the legislature and the courts relied on expert opinion to help determine if the costs in the model "represent, as close as reasonably possible, the cost of education." *Campbell IV* at 55. Without the use of a consultant, it may be difficult for the legislature to represent that the funding model adequately provides funding for the educational program.
3. **Why does the legislature fund 100% of transportation and special education?** There are a couple of reasons for this. The first is that, following *Campbell I*, which declared the funding system unconstitutional, the legislature implemented a new model which included in part funding transportation and special education based on 100% of the prior year's expenditures and in *Campbell II* the Court specifically upheld that portion of the model. The second reason is that these components are done on an expenditure basis because of the difficulty in developing a formula that would adequately represent the costs. If a formula were developed that would "adequately support the actual costs of education" then that would also likely be acceptable, but at this time no such formula has been developed.
4. **Can the legislature reduce or revise the basket of goods (educational program)?** This is a difficult question without having specific proposed changes to consider. As noted in *Campbell I*, "the legislature must first design the best educational system by identifying the 'proper' educational package each Wyoming student is entitled to have whether she lives in Laramie or in Sundance.

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The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package." *Campbell I* at 1279. Or, as the Court described in its *Campbell IV* summary, "it is the legislature's role to determine what should be included in an adequate education for Wyoming children and then it is the legislature's responsibility to adequately fund the programs necessary to deliver that education." Certainly, there are a number of changes that could be made to the educational program that would fit within the requirements of the legislature to define a "thorough and efficient education system." *Campbell IV* at 48. However, there are a couple of considerations that should be noted. First, the current educational program is defined somewhat broadly by the legislature with further implementation by the state board of education, the state superintendent and the local school districts. Making changes to the educational program in statute without significantly revising how education is currently delivered would likely require the elimination of very broad elements of the common core of knowledge or skills which may call into question whether the program is "appropriate for the times". Second, to the extent that the educational program could be revised in a manner that might result in different opportunities in different areas of the state it could call into question whether that would comply with the requirements of the constitution to provide "a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years". Wyoming Constitution Article 7, Section 9.

5. **Which elements of the model are court mandated?** As shown in the historical review above, the Court has issued decisions related to many different elements within the different models at a very detailed level of review. However, this does not necessarily indicate that any specific component is mandated or not mandated. As discussed above, the duty of the legislature is to determine what constitutes an adequate education and then fund the delivery of that education. There are many different possible models, with different elements, that could potentially be used to accomplish that requirement. The Court in *Campbell IV* stated specifically that "This Court did not and should not dictate the method the state must use to determine the cost of education." *Campbell IV* at 55. In that regard, it may be appropriate to ask the consultants selected by the legislature to make suggestions regarding which elements of the model the consultants feel are necessary to adequately fund education and which elements, if any, are not required or that otherwise go above the amount necessary to adequately fund education. The primary issue to determine is "does the state's chosen method of funding represent, as close as reasonably possible, the cost of education." *Id.*

Should you have further questions or need any additional details regarding this information, please advise.